IN THE

Supreme Court of the United States

OCTOBER TERM, 1947. 48

No. 615. 31

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR, *Petitioner*,

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS.

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OPINIONS BELOW.

The District Court of the United States for the District of Columbia (by Justice Jennings Bailey), dismissed respondent's complaint off the bench in an oral decision without opinion. The United States Court of Appeals for the District of Columbia reversed the dismissal upon opening, answering, and reply briefs, after hearing four hours of argument by counsel. The unanimous opinion of the Court (Justices Clark, Wilbur K. Miller and Prettyman) is reported at 165 Fed. 2nd 235 (Adv.) and appears at page 55 through 59 of the record.

JURISDICTIONAL STATEMENT.

The petitioner (at page 2) invokes Sec. 240(a) of the Judicial Code without reference to Rule 38(5) promulgated by this Court thereunder. The petition is deficient in the following respects under the criteria of said rule:

1. Petitioner cannot and does not attempt to show any conflict between circuits.

2. Petitioner cannot and has not attempted to show probability of local conflict.

3. Petitioner cannot and has not shown an open Federal question heretofore undecided by this Court.

4. Petitioner cannot and has not shown any departure from the accepted standards of judicial proceedings below.

5. Petitioner cannot and has not shown a question of substance of general importance relating to the construction or application of the Federal Constitutin or a Federal statute or treaty.

6. Petitioner cannot and has not shown a failure by the Court below to give proper effect to a decision of this Court.

7. Petitioner wishes to retry the recent case of *Land* v. *Dollar*, 330 U. S. 731, which restated the long standing rule of demarcation between sovereign immunity and the property rights of citizens. The very same bench which decided *Land* v. *Dollar* below, unanimously decided the instant case (Justices Clark, Wilbur K. Miller and Prettyman).

8. Petitioner invokes the doctrine of sovereign immunity and specifies it as error below without specifying as error the conclusions of local contract law upon which sovereign immunity would be wholly dependent (the question of passage of title and the question of breach of contract).

9. Such questions of local contract law upon which sovereign immunity depends have been thoroughly examined and argued at length for four hours before the Court of Appeals, yet the petitioner now in effect requests that this

Court re-examine these well settled and long established local rules of contract which the Court of Appeals has unanimously re-affirmed in the instant case.

10. In Point No. 5 of his specification of error (p. 14 of Petition) Petitioner challenges the Court of Appeal's right to hold if had equitable jurisdiction because there was no plain, adequate and complete remedy at law. It is respectfully submitted that the ruling below was correct; but, in any event this is not a valid reason for certiorari under this court's aforementioned rule.

QUESTIONS PRESENTED.

Whether a government official, duly authorized to dispose of government surplus, who has disposed of surplus coal of unique value by a binding contract of present sale, thereby transferring title to a citizen, may recapture title thereto by his own act of will, resell at the same price, and thus confiscate the citizen's property wholly without authority in law; and, when charged therewith by a sworn complaint, employ *a speaking demurrer denominated a motion to dismiss* to cloak himself with sovereign immunity by asserting in affidavits only and not by answer, an affirmative defense—title in the United States—in denial of the allegation of the citizen's title in the sworn complaint and its exhibits, which plainly show a contract of present sale; whether he may assert breach of the contract, also an affirmative defense, in the same way, both without filing an *answer* or permitting an issue to be reached; *whether this Court* (when the Court of Appeals unanimously has stricken this procedure down, after long and thorough hearing and extensive deliberation, and *remanded* the case or trial on these issues which determine jurisdiction under its recent decision in *Dollar* v. *Land* affirmed by this Court, and virtually identical on its facts) *should grant certiorari before a final order has been reached below*, and thus permit the government officer to delay even further a trial of the facts of his illegal conduct and further delay trial

on erroneous technical grounds, and by an avoidance [1] of rules of procedure required to assure due process of law? whether review of well settled local contract questions can be obtained from this Court by error specifying only "sovereign immunity" which is predicated on the local questions mentioned?

STATUTES INVOLVED.

The applicable portions of the Uniform Sales Act are the definitions of sale and contract to sell:

> "(1) A *contract to sell* goods is a contract whereby the seller agrees to transfer the property in goods to to buyer for a consideration called the 'price.'
>
> (2) A *sale* of goods is an agreement whereby the seller *transfers* the property in goods to the buyer for a consideration called the 'price'." (D. C. Code 1940, Tit. 28, Sec. 1101) (italics supplied).

Also Section 28-1504 of the D. C. Code (1940) provides:

> "*Action for converting or detaining goods.* Where the property in the goods has passed to the Buyer and the Seller wrongfully refuses to deliver the goods, the Buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld." (Section 28-1504 D. C. Code 1940).

SUMMARY OF COUNTERSTATEMENT.

This suit was instituted by a complaint for injunction and declaratory judgment by respondent to prevent petitioner from further interfering with respondent's property. The property consists of coal in Texas which petitioner had sold to respondent for $17,500 and then attempted to sell to someone else at the same price. Respondent's pleadings contained their own proof (the contract). Under this contract and the admitted facts passage of title

[1] i. e., by making his affirmative defenses by demurrer supported by surprise affidavits.

to the coal and full compliance with the contract are irrefutable. Indeed it seems petitioner did not elect to challenge the facts by answer because he could not.

On the contrary, the petition for certiorari (page 15, petitioner's brief) confesses the contract. But then by a "motion to dismiss and affidavits" the petitioner uses a speaking demurrer in which he attempts to deny evidentiary facts and assert by demurrer that which he did not put in issue by answer. In pursuance of his erroneous claim to the cloak of sovereign immunity, he argues as if he had filed an answer alleging (1) non-passage of title and (2) breach of contract.

The Court of Appeals for the District of Columbia has gone thoroughly into both of his alleged defenses and unanimously found them unavailable to him under his demurrer. Both are well settled matters of local contract law and are not valid grounds for certiorari.

This Court's attention is respectfully invited to the deficiency of petitioner's specification of error in this respect (Petition p. 14) where petitioner specifies only conclusory "error," i.e., sovereign immunity, without assigning any error as to the two prerequisite contract elements of the decision which control application of the doctrine of sovereign immunity.

COUNTERSTATEMENT.

In early 1946, the Domestic and Foreign Commerce Corporation received information there was a large quantity of bituminous coal, located at various Army camps in Texas and adjoining states, which had been declared surplus and for which the government had received no acceptable bids. The Domestic and Foreign Commerce Corporation purchased somewhat in excess of 100,000 tons of this coal (it pioneered in the field to the great benefit of the government) from the War Assets Administration at a price of $1.75 per ton, which was about half of its cost to the government. This coal had been in open storage for two years. Coal deteriorates rapidly under these conditions. It was

located at points from which coal did not normally move to ports, and where, therefore, only high class rates existed. (Complaint, Par. 4, R. p. 2.)

The Domestic and Foreign Commerce Corporation arranged for the establishment of special low freight rates to ports, made an extensive market survey, and eventually succeeded in reselling the coal for export at a substantial profit. The Domestic and Foreign Commerce Corporation fully and completely complied with all the terms of its contract with the War Assets Administration and divided the coal fairly among foreign governments to whom the U. S. Government desired that it should go. The movement was of great assistance to the economy of Europe (Complaint, Par. 4, R. p. 2). Because the coal was government "surplus," special export licenses were obtained over and above the regular allocations to the various countries. This of course gave this coal unique value to exporters.

Early in March of 1947, the War Assets Administration offered an additional 10,000 tons to the Domestic and Foreign Commerce Corporation and this was purchased (Complaint, Par. 4, R. pp. 2, 3) through an exchange of letters and telegrams which are Exhibits A through E to the Complaint (App. pp. 10 through 30 incl.).

War Assets then asked that a record of the contract be made on its form denominated "sales memorandum" which is Exhibit E to the complaint, which was done. The contract was made on the same terms and conditions as the previous contract and provided for the payment of cash, on sight draft accompanied by shipping documents, for the coal f. o. b. cars at its location, the exact amount to be determined by railroad weights of the coal.

Domestic and Foreign promptly resold the coal (Complaint, Par. 5, R. pp. 2, 3) Exhibits A through E (R. p. 10 to 16) relying on its previous favorable experience with War Assets Administration and upon legal advice that the coal was specific, ascertained, and deliverable, and that, since the "sales memorandum" repeatedly referred to itself as a "contract of sale" and referred to the coal as "sold to"

the Domestic and Foreign, title had passed to it. In the light of the successful experience known to both parties of the year before, it felt that it might with perfect safety resell to its customers. The coal was resold at a price of $2.75 per ton plus a share of profit above $1 per ton to the coal exporting firm known as the Penn Pocahontas Coal Company, a company closely allied to one that was used as exporter the previous year, namely the J. P. Routh Coal Company, whose officers and owners are substantially the same as Penn Pocahontas Coal Company (Complaint, par. 13, R. p. 7). Penn Pocahontas resold to the Portuguese government (Affidavit of Kingsley, R. pp. 33 and 34).

The Penn Pocahontas Coal Company promptly established an irrevocable letter of credit to pay the War Assets for this coal against shipping documents (Complaint, Par. 6, App. p. 4, Exhibits M and N, App. pp. 25, 26). The War Assets Administration, which had solicited the bid, then, in a most unusual way, began to seek an out on its contract. The Dallas office of War Assets Administration began to insist successively that various details of the letter of credit were unsatisfactory to them (Complaint, Par. 6 through 9, R. pp. 4 through 6). Although the Domestic and Foreign Commerce Corporation had repeated changes made through the Penn Pocahontas Coal Company (Complaint, Par. 8, App. p. 5), to satisfy the wishes of War Assets in this respect, the War Assets Administration at Dallas, on April 16, 1947, late in the evening, wired the Domestic and Foreign that its contract was cancelled, and declined to respond to two telegrams and to answer one telephone call attempting to determine the reason for the cancellation (Complaint, Par. 10 and 11, R. p. 6).

Protest was made promptly (i.e., on April 18th) to the Deputy Administrator in Washington, General Mollison, and to the then General Counsel, Col. Jess Larson (Counter-affidavit of Kingsley, R. pp. 51 through 53). They promised Major Kingsley, President of Domestic and Foreign Commerce Corporation, and Mr. Ansberry, his counsel, the entire file would come to Washington for review

and that the officers of Domestic would have an opportunity to discuss the unwarranted position of the Dallas office here in view of the difficulty of communication with Dallas caused by the telephone strike. Nevertheless the respondent heard nothing from the officials of War Assets in Washington, despite repeated efforts to reach them, up to and including April 24th (Counter-affidavit of Kingsley, R. pp. 51 through 53). On April 24th, Mr. Ansberry was finally able to reach the Dallas office on the telephone, and was informed that the coal had been sold as of April 21st to the Midland Coal Company of Dallas for the same price, that the matter was closed and that although they had received Col. Larson's teletype requesting a review of the file, that Col. Larson "don't happen to be ruining our office" (*Id.* at R. p. 53). At this point Domestic and Foreign arranged for the filing of this suit and the obtaining of this temporary restraining order (R. pp. 35 and 36) herein issue, with all possible dispatch. It was only at that point, namely on April 29, 1947, that the representatives of Domestic and Foreign, despite continued previous attempts were able to discuss the matter again with counsel for War Assets.

The foregoing discussion of the conduct of the War Assets Administration is offered to the Court as showing the strong equities existing in respondent's favor.

Upon the filing of the complaint a temporary restraining order was issued. On the hearing of a motion for injunction pending trial the petitioner filed five minutes prior thereto a motion for dismissal of the complaint supported by two lengthy affidavits. (R., pp. 40 through 50).

The petitioner in his motion contended that the suit was in effect against the United States because title could not have passed to the respondent as alleged in the complaint; and that therefore the suit was in effect against the United States and failed to state a cause of action, due to sovereign immunity. In this, petitioner was sustained in the District Court. The Court of Appeals unanimously

reversed on the grounds first, that the allegation of title in the complaint had to be taken as true on motion to dismiss and, second, that if title was in the citizen, sovereign immunity did not protect a government officer interfering illegally with the citizen's property. Therefore, said the Court of Appeals, correctly, we respectfully submit, the District Court should have taken evidence on the point of title before it could dismiss on the ground of sovereign immunity:

> "In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir Erk* v. *Glenn L. Martin Co.*, 4 Cir. 116 F. (2d) 865." 165 F. (2d) 236, 237.

Petitioner has not responded by answer to any of the allegations of the complaint. He has instead endeavored to make a motion to dismiss supported by affidavits serve the function of an answer. He has thus sought to deny the following plain allegations of the complaint: (1) title to the coal in respondent and (2) no breach of the contract of sale by respondent. This he seeks to do by affidavits and to exclude any response to the misstatement contained therein by procedural surprise (Thirty-one pages of pleadings filed five minutes before the District Court hearing). Comment of the Court of Appeals thereon is significant:

> "The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled" 165 F. (2d) 235, 237.

(See footnote, No. 10 petitioner's brief, p. 13, seeking to exclude the reply contained in Kingsley Counter-affidavit and footnote 8, p. 12, *Id.*, disclaiming reliance on his affidavits after a lengthy use thereof in the body of his brief.)

Petitioner assumes the position he might have achieved by denial of some of the evidentiary facts in the complaint even though he has, in fact, demurred to the complaint and thus foreclosed the taking of any evidence on the points he now disputes. And now by petition for certiorari before a final order had been entered in the case petitioner seeks to prevent, by resort to sovereign immunity, a prompt inquiry into the facts by preventing a remand to the District Court.

While complaining of the urgency of getting on with the disposal of surplus, petitioner still seeks the further necessary delay of a hearing in this Court in order that he may, without warrant in law, prefer the second purchaser at the identical price over the first purchaser. And this even though the first purchaser is a pioneer in assisting the government in the disposal of surplus coal. This, even despite the risk of total loss of this coal by spontaneous combustion and the certain loss of part of its heating value by the passage of even more time.

The District Court (by Justice Jennings Bailey in a short oral decision) dismissed respondent's complaint. The Court of Appeals (Justices Clark, Wilbur K. Miller, and Prettyman) after four hours of argument (opinion by Justice Clark) decided against the petitioner in all of the various erroneous arguments raised by him. It is to be noted that this was the same bench that decided *Land* v. *Dollar* upon which petitioner argues nonconformity.

SUMMARY OF REASONS FOR DENYING THE WRIT.

The Court of Appeals has unanimously and, we submit, correctly applied the salutary, recently reaffirmed, and ancient rule of *Land* v. *Dollar* and related cases; that, where the citizen alleges illegal interference by a government officer with the property of the citizen, the govern-

ment officer must answer; that if the alleged facts are true, there is jurisdiction; if not, sovereign immunity applies; and that therefore, the trial court must solve the impasse by making an adequate preliminary determination of these jurisdictional facts, if properly controverted; if admitted as they were by a motion to dismiss, sovereign immunity is absent on that state of the record.

No conflict between the circuits is claimed by petitioner, on this principle. The claimd conflict with prior decisions of this Court is erroneous.

No suit for specific performance is involved; a suit for specific performance is one to *obtain* title under a contract *to sell in futuro;* respondent alleged title in himself (petitioner has not denied, and in fact, petitioner's admission (Petition, p. 15) of the execution of the contract of *present sale* proves title in respondent); the only positive act petitioner might be required to do if asked, would be a purely ministerial one (i.e., load coal and collect money by presentation of documents against an irrevocable letter of credit) yet petitioner seeks to make this detail of everyday trade into a political act, so that he may confiscate unique property.

No final order has been entered below—petitioner may still set up his affirmative defenses by answer in District Court as he should have done originally.

The unsupported assertion that surplus coal is not unique in its "extraordinary license" value to exporters, contrary to the allegation of the complaint, and the plain finding of the Court of Appeals in accordance therewith, is, as an obviously correct ruling and as a matter unlikely to arise again, no ground for certiorari.

The rule of *Land* v. *Dollar* is one of general importance —but it has been too recently and plainly elucidated by this Court to justify further delay in violation of it for a mere reaffirmance on facts even more favorable[1] to the citizen

[1] The Dollar interests alleged only *equitable* title under a contract of pledge. Respondent alleged both legal and equitable title, and, like Dollar, were met only by a motion to dismiss.

plaintiff. No other principle of general importance is at stake in this case, and the correct decision of the Court of Appeals should go into effect at one, while this one shipload of coal has greatest value to a cold world.

Petitioner then attempts to convert the instant case into a suit for specific performance "on the plaintiff's naked allegation that title has passed." The instant case is of course not a suit for specific performance and requests no compulsion. Even if this were the case it would be no proper objection inasmuch as mandamus issues against officers of the government to compel their ministerial non-discretionary acts in proper cases. As to the passage of title it is to be noted that respondent's pleadings contain their own irrefutable proof in the content of the four squares of the contract of sale itself and under the parol evidence rule petitioner could not deny the express provision of his own contract which he has already confessed by admitting the contract at page 15 of the petition itself.

At page 15 of petitioner's brief under the head of "reasons for granting the writ" petitioner erroneously attempts to read into the Court of Appeals' decision an interpretation that the Court of Appeals understood *Land* v. *Dollar*, 330 U. S. 731, as "overruling or disapproving prior decisions" of the Supreme Court. The error of this is shown by the language of the Court's opinion at 165 F. (2d) 236 "we have recently had occasion to scrutinize the doctrine of sovereign immunity as a 'jurisdictional problem' (*Dollar* v. *Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307, affirmed 330 U. S. 731, 67 S. Ct. 62) and in doing so we deemed it expedient to adopt the careful analysis which had been made previously by Justice Stephens of this Court in his opinion 'dissenting in part, concurring in part' in *Franklin T. P. in Somerset County, N. J.*, v. *Tugwell*, 66 App. D. C. 42, 85 F. (2d) 208."

ARGUMENT.

Under 1(a) of his reasons for granting the writ (Pet. p. 15), petitioner asserts that the coal is the property of the United States, then inconsistently admits "that the United States duly entered into a conventional sales contract disposition," thereby admitting that the coal in question is *no longer the property of the United States* but rather that it *was* disposed of to the respondent. At the top of page 16 the petition reads "that respondent having failed to fulfill its contractual obligation by a single cash payment thereby breached the agreement." But the petitioner makes no reference to any such provision in the contract. There is none; the provision is "cash *on presentation of railroad weight tickets as shipped*" (R., p. 15) (italics supplied). The "single" (advance) "payment" incorrect statement of fact has already been fully argued and overruled at the Court of Appeals hearing. Respondent's duty was simply to pay for the coal when invoices were presented. Since 10,000 tons is several trainloads of coal, it is obvious a single payment could not be made. Respondent is now, and always has been, ready to meet invoices as presented.

Even if the suit had requested positive action, it would not request specific performance of a contract to sell requiring a passage of title by the United States or any executive act requiring discretion, but merely would request that the War Assets Administrator as an individual be compelled to carry out his ministerial duty to load respondent's coal.

"Specific performance" in the ordinary legal sense of the term means specific performance of a contract to sell, i.e., an order of the Court compelling the transfer of title as promised in the contract to sell. The situation here is as urged above, a present sale at the time of making the contract. Hence, there is no need to have specific performance because title has already passed. Even if respondent had only equitable title legal title could be compelled in the

same manner that this Court has many times held it could be in Land Department (Interior) cases.

The only specific performance, and that not in the legal sense of the term, which could be requested, and it has not been requested in the complaint, is performance of petitioner's ministerial duty to load respondent's coal on the cars. The only relief which respondent has requested in his complaint is that the Court prevent delivery of his coal to others by the wrongful act of petitioner. Respondent assumes that if petitioner were enjoined from delivering to others petitioner would desire to carry out his ministerial duty to load the coal as thus suggested for him by legal process.

However, the duty to load the coal when and if asked or directed would be purely a ministerial one. A mandamus to perform a ministerial duty does not violate sovereign immunity. *Kendall* v. *United States*, 12 Peters 524 (1838).

Again, petitioner states ". . . the Government, for its part, claimed both that respondent was in default and that full title remained in the United States" (Petitioner's brief, p. 16). Nowhere in the record is there any appearance of or pleading by the United States. Nor is there any answer in the record asserting these affirmative defenses. The only claim by Littlejohn as an individual is in the form of affidavits of Lennon and Day on which petitioner asserts (by footnote No. 8, p. 12 of Petitioner's Brief) he does not rely, and on which he has no right to rely. They contradict plain allegations of fact in a complaint to which he has demurred.

I (b): Petitioner urges (p. 17 of Petition under 1(b)) that respondent is attempting to compel the War Assets Administrator as an official of the United States to perform its contract by officially ordering his subordinates to load the 10,000 tons of coal.

Petitioner is in error. It is not respondent who seeks to compel this, it is the law of the United States and it is the action of the petitioner himself which compels it. Peti-

tioner validly *disposed* of the property in question which he admits he had full power and authority to do. Having done this, and the coal having become by and under law the property of the respondent, he is bound under law to respect the property rights of the respondent just as any other citizen would be.

The cases cited by petitioner in his I(b) are discussed in our section I(c) *infra*.

I (c): The Court of Appeals pointed out, in disposing of petitioner's sweeping claim of immunity:

> "All will concede at the outset that a court has no jurisdiction of a suit against the United States to which the United States has not consented. *United State* v. *Sherwood*, 312 U. S. 584, 587, 61 S. Ct. 767, 85 L. Ed. 1058. That is a ruling doctrine which has long been accepted, as the case cited demonstrates. However, since legal irresponsibility of the Federal Government is derived only by implication from the Constitution, the doctrine has received judicial delimitation which is well established. *United States* v. *Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171. Therefore, although we may observe that the War Assets Administration functions only as an agency of the United States, it must also be noted that '. . . the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 388, 59 S. Ct. 516, 83 L. Ed. 784." 165 F. 2d 235, 237.

Petitioner's footnote on *Goldberg* v. *Daniels* might create a misunderstanding of the record in that case. Footnote 13, Petitioner's Brief, p. 19:

> "The petition for writ of mandamus in *Goldberg* v. *Daniels, supra*, alleged (R. 4, No. 79, Oct. T. 1913): '13. And your petitioner claims that he is the true owner and entitled to immediate delivery of the possession of said cruiser *Boston* to him.'"

is correct so far as it goes but omits to state that the citizen's allegation of title was met by a direct denial by an-

swer to the rule to show cause, setting up title in the United States, and that the citizen plaintiff then demurred to this affirmative pleading by the Secretary of the Navy—*Sub nomine* United States *ex rel.* Goldberg *v.* Meyer, 37 App. D. C. 282, 286.

In that case, Goldberg alleged that he was high bidder under a statutory sale of a warship which the Court of Appeals interpreted to be for all practical purposes an ordinary auction sale, *i.e.*, one not stated to be without reserve:

> "The statute under consideration does not, in terms, declare that a vessel when offered for sale shall not be withdrawn, but shall be declared sold to the highest bidder, regardless of conditions that may arise after advertisement rendering it important to reconsider the decision to sell, and to retain the vessel for the uses of the government; nor can we interpret it so to mean. All that it commands is that the vessel shall be offered for sale in a particular manner, and that 'any vessel *sold,' shall be delivered to the purchaser.* Congress might have directed the sale to be made at public auction to the highest bidder, instead of through written bids to be opened upon the advertised date. Had that been done, it could not be successfully contended that the sale at such auction would be complete *until the acceptance of the highest bid.* It is settled law that an auction sale, whether made by a private owner or by an officer under execution of a decree, is not complete until the bid shall have been accepted, and the property struck off and declared sold to the bidder. The seller may decline to accept the bid, and may withdraw the property from sale. *Until acceptance of his bid, the bidder acquires no title to the property. Blossom* v. *Milwaukee & C. R. Co.*, 3 Wall. 196-206, 18 L. ed. 43-46. *We perceive no difference between a sale made at public outcry, and one made in the manner prescribed by statute.* In each case it is an offer for sale to the highest bidder, *and no sale is made until the bid is accepted.*" (Italics supplied.) *Id.* at 286.

He was met *by an answer* on the part of the Secretary of the Navy, *which set up this affirmative defense:*

(1) the offer had not been accepted; (2) title was therefore in the United States. *Goldberg* then *demurred*, thereby *admitting* he had no title and *that title was in the United States.* The Court of Appeals quite properly affirmed the overruling of Goldberg's demurrer.

The Court of Appeals made quite clear that, had the state of the record placed title in Goldberg, mandamus would issue; but that since "no sale was actually made" (*Id.* at 289) title was in the United States, and sovereign immunity applied.

The abbreviated opinion of this Court is entirely in accord, carefully pointing out that the United States, on the state of the record, was the "owner" (231 U. S. at 287, 288), and therefore the military discretion feature also mentioned by the lower Court need not be the sole basis of decision.

O'Harra v. *Littlejohn*, relied on by petitioner at p. 18 of his brief, is a correct application of *Goldberg* v. *Daniels*, in that it involved the rejection of a high bid on the ground the bidder was not entitled to veteran's priority, and hence no *sale* had taken place, and the United States had title.

The recent local case of *Palmer Bolt & Nut Co. Inc.* v. *Littlejohn* in the U. S. District Court for the District Court (unreported as yet), is more in point. Palmer alleged title under a contract of sale to certain goods possessed by Littlejohn. Justice Pine correctly ruled that this issue on the merits controlled the jurisdiction, and therefore, following the rule in *Land* v. *Dollar* set the case down for hearing on the merits, and denied dismissal on motion to dismiss.

Petitioner then questions (at p. 20, brief for petitioner) the importance of title in the premises. Title, of course, is the basis of and has countless consequences in the law of sales. *United States* v. *Lee* turned specifically on "technical doctrines of passage of title." The army officers there involved claimed under a void tax deed.

Goltra v. *Weeks*, and *Pennoyer* v. *McConnaughy*, cited by petitioner, are cases where, after passage of title, officers were mandamusable to complete ministerial acts of delivery.

It is, of course, well settled that the mere fact that the United States is not a formal party to the record would be of no importance if the substantial effect of the decree were to be against the dominant interest of the sovereign. Petitioner erroneously concludes that this case involves forcing the executive discretionary act of a political officer of the United States where of course the dominant interest of the sovereign is on the side of non-interference.

On the contrary, this case is on all fours with *Land* v. *Dollar* (and, in fact, is stronger than *Land* v. *Dollar*—the Dollar interests alleged only equitable title, whereas respondent here shows both equitable and legal title) where the dominant interest of the sovereign was to protect the victim from wrongful interference with his property. Respondent has shown his legal title to the coal in question derived from the War Assets Administrator by his action in conformity with the Surplus Property Act. Having sold under his statutory authority, he is bound to deliver (a ministerial act) under his correlative statutory duty. This is a case like *Pennoyer* v. *McConnaughy* (Petitioner's brief, p. 17) where a disposal officer of the government in question has in fact entered into a sale and transferred title to the property and then refuses to complete final ministerial steps, which he was compelled to do. Respondent is not here contending that, had Littlejohn refused his offer for the coal, he would be in a position to compel the War Assets Administrator to enter into a contract. The fact remains that the Administrator did enter into a contract passing equitable and legal title.

The effort (Petitioner's brief, 20, 22) to distinguish *Dollar* v. *Land* on the argument that the Dollar interests had once had possession of the stock in question while we have never had possession of the coal in question was cor-

rectly overruled by the Court of Appeals after full argument. Since respondent has title under a contract of sale, he may maintain action for wrongful conversion and wrongful withholding. Petitioner's attempt to distinguish *Land* v. *Dollar, supra,* from this case may be due to a confusion of common law replevin with common law detinue. Section 66 of the Uniform Sales Act makes the following provision:

> "Action for converting or detaining goods. Where the property in the goods has passed to the Buyer and the Seller wrongfully refuses to deliver the goods, the Buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld." Section 28-1504 D. C. Code (1940).

This restates the common law and present-day rule of action and specifically applied them to cases of the instant type. *Mechanics Bank of Alexandria* v. *Seaton,* 1 Pet. (26 U. S.) 299, 7 L. ed. 152; *Wiend* v. *Semkin,* 2 App. D. C. 425 (1894); *Logan* v. *Cross,* 101 Ore. 85, 198 Pac. 1097 (1921); *Rudin* v. *King-Richardson,* 311, Ill. 513, 143 N. E. 198 (1924).

1 ULA 368 (1931) contains the following comment in the form of the Commissioner's note:

> "This section, which is not contained in the English Act, allows trover, replevin, equitable or other relief as the local law may warrant."

Moreover, *Land* v. *Dollar* did not turn on the fact of possession once at some distant time having been in the Dollar interests but on the fact that the Dollar interests *had alleged title* to the stock in question and the *allegation stood undenied.*

The renewed effort of the petitioner (Petitioner's brief, p. 15, 16, 17, 23) to apply patently distinguished cases where officials have terminated a contract for *continuing* services to the government, such as *Transcontinental &*

Western Air v. *Farley* and *Wells* v. *Roper*, was correctly denied below. Those are the very cases where the doctrine of sovereign immunity is unquestionably applicable *on account of the right of the sovereign to select and dispense with his agents performing continuing sovereign functions* such as carrying the mail. This principle is always distinguished from the equally well established principle of the law that the sovereign cannot gain title to any property except through legal means and cannot regain title by its own wrongful act. *U. S.* v. *Lee*, 106 U. S. 196; *Goltra* v. *Weeks*, 271 U. S. 536; *Land* v. *Dollar*; 330 U. S. 231, and allied cases.

The United States here has no interest in the proceedings. A duly appointed disposal official of the United States has disposed of United States property and the defendant remains as the mere bailee of the property in question. Under the allegations of *Dollar* v. *Land*, the United States was holding legal title and possession of the stock in question, subject to a contract of pledge.

Petitioner urges (Petitioner's brief, p. 24) that respondent's right to sue under the Tucker Act for breach of its contract rights eliminates respondent's right to sue for wrongful interference wtih its title and right to possession.[1] In *Dollar* v. *Land*, plaintiff had a right to sue in contract for breach of the contract of pledge, but, as here, it also had a right to enjoin wrongful interference with its title and right to possession.

There are many instances in the public lands cases where the Secretary of the Interior as disposal officer has been forced to carry out ministerial duties of perfecting plaintiff's land patent papers, once equitable title has passed. *Lane* v. *Hoglund*, 244 U. S. 175 (1917) is typical. Of course, on the other hand, if plaintiff has no equitable title man-

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[1] The Court below went thoroughly into the equitable question of the unique nature of the coal and the irreparable damage deriving from the facts and witnesses of the case, which is not a valid reason for certiorari.

damus (forcing passage of legal title) will not issue. *Minnesota* v. *Hitchcock*.

Perkins v. *Lakens Steel Company*, 310 U. S. 113, has no application to the facts in this case. Respondent freely concedes that it could not have compelled the War Assets Administrator to accept its offer for the coal any more than the steel companies could compel the government to buy their steel. The War Assets Administrator was free to select those to whom he would sell. *He has exercised this right.* He has in fact sold to the Domestic and Foreign Commerce Corporation and completed entirely the exercise of his discretionary functions, as the Court of Appeals ruled.

The argument of counsel for the petitioner (page 22, petitioner's brief) that, if he is permitted arbitrarily to reclaim title which he has passed, at his pleasure, the disposal of surplus will thereby be speeded, is two-edged. Had the petitioner not determined to get out of this sale, the coal would now have long since been in Europe and burned. He would have paid in full and the matter would be at an end as in the case of the successful contract of 1946. On the other hand, if the petitioner is entitled to resist this suit under the cloak of his protection as an officer of the government, regardless of his wrongful attack on the plaintiff's property, then it is difficult to see why other prospective purchasers from War Assets will not be much discouraged. Billions of dollars of previous sales will be unsettled where the same contract forms were used.

The argument of the petitioner (page 22, petitioner's brief) that the speed of equity is at variance with the slow procedure provided for suits under the Tucker Act, is an objection which applied with equal force to *Dollar* v. *Land*, to the public land cases, and to all other cases where the citizen has a legitimate injunctive remedy against government officers exceeding their authority and interfering with citizens' property or possessions.

Petitioner makes the unsupported assertion "There has been no personal misconduct on petitioner's part"—*Id.* at 20. Apparently, petitioner overlooks "*respondeat superior*" and wishes to disclaim civil responsibility for the wrongs of his subordinates, the employees of War Assets. He cites for this, *Williams* v. *Fanning*, a case holding that a particular postmaster may be mandamused for illegal exclusion of matter from the mails, *as well as* the Postmaster General, in accordance with the correlative principle of agency that agent, as well as principal, is responsible for the agent's illegal acts.

II. Petitioner has not specified as error those points of local law (non-passage of title and breach) on which his general specification of error (sovereign immunity) is wholly dependent.

(a) The brief of petitioner proceeds throughout on the premise that the contract he entered into did not pass title. This overlooks a fundamental principle of the law of sales, namely that an "agreement to sell" passes title in the future whereas a "contract of sale" passes title at the time the contract is made. This was a contract of sale.

The complaint alleged that title had passed to the respondent and the Court of Appeals correctly ruled that this should have been taken as true.

This is so for three reasons. (1) The District Court had to accept conclusively the undenied allegations of passage of title (Complaint, Par. 12, R. pp. 6 and 7) in the complaint. (2) There was no evidence in the record for the Court to base a finding of non-passage of title. (3) Respondent was entitled to introduce evidence on the point of controverted, but was given no opportunity to do so.

Unless the complaint itself revealed facts which made impossible the passage of title, the Court below was bound on a motion to dismiss (which amounts to a demurrer) to treat the allegation as true.

It is well settled that the manifested intention of the parties governs the passage of title. On this question of

intention respondent was entitled to show ". . . the actual intent of the parties . . . from the terms of the contract, the conduct of the parties, and all the circumstances of the case." (*Brown Lumber Co., Inc.* v. *Commissioner of Internal Revenue*, 59 App. D. C. 110, 35 F. 2nd, 880, 882.) *Electric Storage Battery Company* v. *District of Columbia*, 155 F. 2nd 867, 870 (1946), (App. D. C.). See also *Secor* v. *Tompkins Co.*, 45 A (2nd) 117 (D. C. Mun. App. 1946).

Therefore, respondent had a right to introduce evidence on the point of actual intention. He was entitled to an opportunity to be heard on the point of passage of title, and prove that the allegation of the complaint was in fact true. Yet the respondent was expected to reply to this point raised by the "speaking demurrer" denominated "motion to dismiss" on five minutes notice. Just as in *Land* v. *Dollar*:

> "although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the *question of jurisdiction is dependent on decision of the merits.*" (Italics supplied.) 330 U. S. 731, 735.

Thus respondent was entitled to have his allegation of title taken as true since the question on the merits, whether title had passed to respondent, controlled also the question of jurisdiction.

Here the parties conclusively manifested that they intended that title should pass at the time of making the contract, as evidenced by the words of art used therein. This is conclusive and irrefutable proof that title to the coal did pass, as held by the Court below, upon the execution of the contract. Indeed petitioner would be precluded by the parol evidence rule from contradicting the express language of his own contract on the point.

The controlling legal principle in the law of sales is that the property in specific goods passes when the parties so intend. (D. C. Code 1940, Tit. 28, Sec. 1202).

> "It must, therefore, constantly be borne in mind that the rules here spoken of, like others in the section of the Sales Act under consideration, are rules of presumption merely and will yield to proof of a contrary intention. Probably the statement of Benjamin, quoted with approval by the Circuit Court of Appeals, accurately sums up the matter. Slight evidence, says Mr. Benjamin, is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances." (*Williston on Sales*, 2d Ed. 1924, Sec. 280.)

The petitioner in his standard form denominated "sales memorandum" (Complaint, Exhibit E) has used words of art which from the earliest days of the law merchant have indicated an intention to pass title at once. This sales memorandum (Complaint, Exhibit D) contains no less than seven references to itself as a *contract of sale* or *a sale*. At no place in this document was there any reference to itself as a *contract to sell*. Since the early law merchant at the common law, going back to *Tarling* v. *Baxter*, 6 B. and C. 360, there has been a fundamental distinction between a sale *in praesenti* and a *sale in futuro*. It is an elementary proposition that contract of sale and contract to sell are words of art having definite and concise meaning as to the distinction between immediate passage of title and a mere agreement to pass title at some time in the future. The Uniform Sales Act has declared and restated this in unmistakable terms in Section 1 which appears at Tit. 28, Sec. 1101, D. C. Code (1940).

> "(1) A *contract to sell goods* is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the 'price.'

> "(2) A *sale* of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the 'price'." (Italics supplied.)

Language, and the holding, in *United States* v. *Amalgamated Sugar Company*, 72 F. (2d) 755 (C. C. A. 10th, 1931) are squarely in point:

> ". . . each contract refers to the transaction as a sale, not an agreement to sell at a future time. That is persuasive." *Id.* at 757.

and further:

> "Whether a contract is one of sale or one to sell depends very largely upon the intention of the parties. If they intend a present transfer of title it is a contract of sale; otherwise a contract to sell." *Id.* at 758.

The Court in that case thereupon concluded that title passed at the time of making the contract.

Petitioner seeks to avoid the words of art in his own contract. Even if doubt existed, his contract in case of ambiguity should be construed against him.

It is submitted that these words of art are certainly sufficient to support the specific allegation that title had passed against a motion to dismiss, and in fact conclusively show that title was passed to the Domestic and Foreign Commerce Corporation at the time of making the contract.

A case squarely in point is *Nashville Industrial Corp. and Technical Economist Corp.* v. *United States*, 71 Ct. Cl. 405 (1941). This case is also similar to the present one in that it involved surplus property disposal after the first World War. There was an attempt to contend that title had not passed to the purchaser. The contract read:

> "The seller agrees to sell, and the purchaser agrees to purchase, the following described property at prices and on the terms hereinafter set out:
>
> 'Eighty-five (85) Werner & Pfleiderer, Type VI, size 15, Glass B. B. jacketed, mixing machines at a

unit price of six hundred fifty ($650) each, *f.o.b. cars* Old Hickory, Tennessee, or a total consideration of fifty-five thousand two hundred and fifty dollars ($55,250) for the eighty-five (85) machines. * * *" *Id.* at 406 (Italics supplied).

The Court ruled that title passed immediately to the purchaser showing that both under the common law and the Uniform Sales Act title had passed at the time of making the contract. The Court cited Rule I, *supra*, and used the following language:

"Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject can not be entertained if the terms of bargain and sale, including the price are explicit." *Id.* at 418.

"Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties. *Gilmore* v. *Supple*, 11 Moore P. C. C. 55, Benjamin, Sales (2d Ed.) 280; *Duplop* v. *Lambert*, 6 Cl. & Fin. 600; *Calcutta Co.* v. *DeMattos*, 32 Law J. Rep. N. S. Q. B. 322 338." *Id.* at 418.

"The contract we are considering relates to the sale and purchase of specific goods. The price is explicitly stated. The goods to be transferred are in a deliverable state, nothing remaining to be done to them prior to their delivery.

"We think the agreement was an unconditional contract of sale and that the title to the property sold vested in the vendee, the Technical Economist Corporation, upon the execution of the contract. There is nothing in any of the provisions of the contract which shows a contrary intent of the parties. * * *. *Id.* at 418.

> "Under the rule laid down by the decisions above cited, as well as by the plain and unqualified language of the Tennessee uniform sales law, the fact that the time of payment, or the time of delivery, or both be postponed, is immaterial as to the immediate passing of title to the buyer in goods sold under an unconditional contract of sale of specific goods in a deliverable state." *Id.* at 419.

II (b) Equitable relief is supported *inter alia* by unique value of surplus coal to exporters.

As alleged in the complaint:

> "the plaintiff applied for . . . special export licenses outside the regular export allocation system of the United States government for newly mined coal, which were granted" (Complaint, par. 4 App. p. 2).

Thus, special additional allocations were granted to respondent's foreign purchasers last year for the export of surplus coal which would not have been granted for newly mined coal. Although coal by itself is a non-unique chattel, the further fact that it is surplus gives it a unique value in the eyes of exporters. This makes the case very similar to the ancient English case of the cowhorn which was the muniment of title by which the plaintiff held his land. Lord Keeper North ruled in this famous case, *Pusey v. Pusey,* 1 Vern, 273, 23 Eng. Reports 465 (1684) that defendant might be ordeged to deliver up this horn. Plaintiff's ancestors held the land by "the tenure of cornage" that is, the blowing of this particular horn to alarm the country of the approach of the enemy. The horn, of course, in itself, was easily replaceable, but it had an extraneous unique value, and so, too, with this surplus coal, which has the extraneous value of being more easily licensed for export than other coal. The respondent, of course, can never obtain any surplus coal except from the petitioner. Respondent's re-purchasers, who want the coal solely for export, and who insist on surplus coal particularly, will not accept the substitution of other coal of a non-surplus kind. They

might never be able to export new-mined coal because non-surplus coal has at various times been held, by the export control authorities, essential to the American economy. Surplus coal furnishes foreign nations with an additional quantity over and above what they can obtain otherwise under the allocation system and is, therefore, to that extent, unique.

Respondent also had no plain, adequate and complete remedy at law because of (1) loss of trade reputation (2) damage would not be readily compensable, (3) part of the damage could not be measurable, and (4) it would cause risk of multiplicity of suits.

CONCLUSION.

Wherefore it is respectfully submitted that the unanimous decision of the United States Court of Appeals for the District of Columbia was correct in law and that the petition for writ of certiorari in this cause should be denied.

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SUGGESTION OF FACT.

Respondent wishes to suggest the following facts;

The petitioner entered two contracts of sale for the coal in question. The first was the contract to respondent involved herein and the second a later contract to the Midland Coal Company.

Since the Respondent's original brief was filed, respondent has entered an agreement with the Midland Coal Company whereby each party has agreed to exchange a one half interest in each other's contracts regardless to which party the petitioner delivers the coal covered by this proceeding. It therefore seems doubtful if a substantial issue remains, and the case may be accordingly held moot. The petitioner has heretofore indicated in the record his wish to make delivery under the Midland contract.